

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 749 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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MADHUKANTA MANGALDAS

Versus

KALAVATIBEN TRIKAMLAL  
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Appearance:

MR KS NANAVATI for Petitioners

MR SK JHAVERI for Respondent No. 1, 2  
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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 07/04/2000

CAV JUDGEMENT

#. This plaintiffs' appeal against judgment and decree dated 15-3-1979 of City Civil Court Judge dismissing the suit of the plaintiffs appellants.

#. The brief facts are that the plaintiffs alleged that

the disputed chowk of City Survey No.2760 is of joint ownership of the parties to the suit. It was alleged that the defendants have demolished their house over survey No.2758 and started reconstructing the same from foundation. City Survey No.2757 formerly had a door leading to the suit chowk. The door was partly filled up and at that place, a window was constructed. The house bearing City Survey No.2758 of the defendants had its door in the northern wall. The access from that house is towards the disputed chowk. The house City Survey No.2759 has a door on its eastern wall opening on the suit chowk. The plaintiffs also alleged that they had their otas of stone over a part of the suit chowk and the remaining part of the suit chowk is open land. The grievance of the plaintiffs was that the defendants while reconstructing their house made aerial encroachment in first floor level of their house by putting up beam and slab and by projecting a chhaja and that they have made preparation for projecting a CHHAJA above second floor level to the extent of third floor more than the projection that the defendants had made on the first floor level. It was further alleged that in this way the defendants were preparing to make aerial encroachment over the otas of the plaintiffs and the suit chowk which is in joint ownership of the parties. It was also alleged that in joint wall of the parties, the defendant made encroachment by 3 inches and placed slab thereon which had prevented the plaintiffs from enjoying joint wall and from placing slab towards the plaintiffs' side. The encroachment over the joint wall was alleged to be 3 inches more than half of the width of the joint wall. On account of projection of CHHAJA, it was apprehended that the plaintiffs' right to receive light and air into their house could be adversely affected.

#. The suit was contested by the defendants on the ground that the suit chowk is not joint property in the joint ownership of the parties but it is exclusive property belonging to the defendant. It was denied that the new construction has in any way caused obstructions to the plaintiffs' right to receive air and light through disputed chowk. The encroachment over the joint wall was also denied. It was further denied that there was any aerial encroachment towards the disputed chowk.

#. The trial court found that the disputed chowk is not joint property of the parties rather it is exclusive property of the defendant. Local inspection was also made by the trial court and note was prepared on 12th February, 1979. The Commissioner was also appointed who prepared spot inspection note and map. Considering the

entire evidence, including the inspection note prepared by the trial Judge, the suit was dismissed. It is therefore this appeal.

#. The first point for consideration is whether the disputed chowk bearing Survey No.2760 is exclusive property of the defendant or it is a joint property of the parties. Having heard the learned counsel for the parties and perusing the judgment under appeal as well as the record and the note of local inspection recorded by the trial judge, I find that it could not be proved successfully by the plaintiffs that they are joint owners of the disputed chowk. The trial court judge justified in holding from the evidence on record that the disputed chowk was exclusive property of the defendant. For this the trial court has rightly found that the sale deed Exh.82 was insufficient to throw light regarding plaintiffs' case of joint ownership in the disputed chowk. Likewise, the trial court was justified in observing from the mortgage deed Exh.62 that this also does not show that the disputed chowk shown in it to the northern side of the defendants's property is of exclusive ownership of the defendant. No other documentary evidence was filed by the parties to establish that the disputed chowk is either exclusive property of the defendant or it is joint property of the parties.

#. The trial court has relied upon several circumstances mentioned in the judgment for coming to the conclusion that the disputed chowk is exclusive property of the defendant. These circumstances have been drawn from the material on record and not on imagination. The first circumstance pointed out by the trial court was that for the last more than 40 years, the house of the plaintiff No.2 over the Survey No.2757 had no opening or door towards the disputed chowk. Except window, no other opening was found by the trial court on the disputed chowk. Thus, the joint user of the disputed chowk by the plaintiff was rightly disbelieved by the trial court. Evidence has been properly appreciated and the circumstances inferred from the evidence by the trial court hardly require any interference.

#. The report of the Commissioner was also considered by the trial court in its proper perspective. Accordingly, the trial court concluded that the disputed chowk is of the exclusive ownership of the defendant and at the most the plaintiff No.1 has mere right of passage over the suit chowk for the purposes of going and coming from her house bearing City Survey No.2759.

#. In the alternative, the trial court further found that even if it is assumed that the disputed chowk is joint property, suit for injunction filed by the plaintiff could not be decreed. This view also does not suffer from any error of fact or law. If the disputed chowk was held to be exclusive property of the defendant, the later had right to use the disputed chowk to the exclusion of the plaintiff. If the disputed chowk for a moment was assumed to be joint property, the parties had right to use the same and no co-owner can claim injunction against another owner from using the property. Of course, the injunction could be claimed only when the right of user of one of the co-owners was totally obstructed. That is not the case before me in this appeal.

#. Regarding the construction of ota by the defendant over the disputed chowk, the trial court found that the defendants' ota is old ota. Not only that the trial court found this from the evidence on record but while making local inspection of the disputed land, the trial court found in its note prepared on 12th February, 1979 that the ota of the defendant which is one of the subject matter of the suit, appears to be old ota. No objection against the local inspection note prepared by the trial court was filed by the parties. Consequently, local inspection note recorded by the trial court conclusively resolves the controversy that the disputed ota allegedly constructed by the defendant is new ota. On the other hand, this ota could be said to be old ota.

##. The trial court further found that the plaintiffs also constructed their otas over the disputed land. In this background, the trial court was justified in observing that if the plaintiffs raised ota over the disputed land, they could not have objected to the defendant using the disputed chowk for using his ota over the joint land.

##. From the evidence on record, the trial court concluded that there was no reduction of light and air entering in the property of the plaintiff No.1 and plaintiff No.2/1 to 2/3 on account of the constructions raised by the defendant. This fact was also noticed by the trial court in its local inspection note, wherein, it was further mentioned that Shri K.G. Shah, learned advocate for the plaintiffs very fairly conceded this position on the record. In view of this note prepared by the trial court, which was not opposed by the plaintiffs, rather plaintiffs' counsel admitted this position frankly

at the spot hence, it is clear that there was no reduction of light and air to the property of the plaintiff Nos.1 and 2/1 to 2/3.

##. Regarding the C.I.Shat above window in the western wall of the house of the plaintiffs No.2/1 to 2/3, the trial court in its local inspection note found that certainly it was not a weather shed put up above their widows as it is at abnormal height from the top of the window frame. Thus, in addition to the reasoning given by the trial court for rejecting the plaintiffs' case about the aerial encroachment, the local inspection note recorded by it, is also furnishing clinching evidence that there was no aerial encroachment causing obstruction to the air and light to the plaintiff's house or that any aerial encroachment was made over the disputed chowk.

##. The trial court further found in its inspection note that no back door in the eastern wall of the plaintiff No.1 has been covered by the construction made by the defendant. In face of all these factual observations made by the trial court in its inspection note, it was justified in dismissing the plaintiffs' suit. It was further justified in refusing to grant mandatory injunction on grounds of delay. The Court Commissioner also noted that the ota constructed by the defendant was old ota which remained unaltered even when the defendant reconstructed his house. As such mandatory injunction for demolition of ota constructed by the defendant was rightly refused by the trial court. Since the trial court did not find any aerial encroachment over the disputed land by construction of Chhaja, it was further justified in refusing to grant decree for demolition of Chhaja.

##. Regarding the encroachment over the joint wall having 14 inches thickness, the trial court found from the evidence on record that there was no satisfactory evidence on record to show that the defendant has put pillars into party walls of the thickness of 10 inches. As such, the alleged encroachment over the joint wall by 3 inches as alleged by the plaintiff was also not proved by any satisfactory evidence.

##. The trial court rightly observed that the joint wall or common wall could be used by the parties jointly. However, it found and rightly too that since the defendants' construction has been completed before filing of the suit without any objection from the side of the plaintiffs, demolition of the slab placed by the

defendant over his portion with the help of common wall cannot be demolished. The slab was placed in the knowledge of the plaintiffs and since they did not raise objection at that time, it would not be equitable and just to grant equitable relief of mandatory injunction in the nature of order for demolition.

##. For the reasons stated above, I find that the suit was rightly dismissed by the trial court. Consequently, there is no merit in this appeal, which is liable to be dismissed.

##. The appeal is hereby dismissed with no order as to costs.

Date : 7-4-2000 [ D.C.Srivastava, J. ]

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